IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 254 OF 1989

The State of Maharashtra. .... Appellant.

Versus.

1. Dipak Balaji Shirsat
Age 24 years, residing at
Bijapur Naka, Solapur.

2. Pushpa Chandram Sindagi,
Age 26 years, residing at
Utkarsha Nagar, Vijapur
Naka, Solapur. .... Respondents.
(Org.Accused.)

Shri D.S.Mhaispurkar, A.P.P. for the Appellant/State.

Shri Tanaji E.Mane for the Respondent No.1.

CORAM ; SMT.RANJANA DESAI, &
ABHAY S. OKA, JJ.

DATED : 3rd November, 2004.

ORAL JUDGMENT (Per Abhay S.Oka, J.)

1. This is an Appeal against the Judgment and Order dated 29th November 1988 passed by the learned 4th Additional Sessions Judge, Solapur, by which the Respondents were acquitted of the offences punishable under section 376 as well as sections 363 and 366 read with section 34 of the Indian Penal Code (hereinafter referred to as "the said Code").

2. One Khandu Govind Kamble, an employee of the Indian Railways, is the complainant. The Complainant has four daughters and a son. The victim of the offence in question is the younger daughter of the Complainant by the name Sunanda. The case of the prosecution is that the Respondents/Accused on 28th March 1987 kidnapped the said Sunanda Kamble from the lawful custody of the Complainant in order that the said minor girl could be forced to have illicit intercourse. The case of the prosecution is that the Respondent No.1/Accused No.1 after kidnapping Sunanda took her to the house of one Laxman Mohan Kokate at Dighe, Taluka Haveli, District Pune and committed rape on her.

3. The case of the prosecution is that shortly after the mid-night of 27th March 1987, the Complainant left his house for attending his duty. The prosecutrix i.e. the younger daughter of the Complainant went to School at 7.00 a.m. in the morning on 28th March 1987. She returned to the house in the recess at about 9.00 a.m. After having tea in the house, she returned to the School. As the Prosecutrix did not return from the School for a long time, the Complainant's son Kallappa made enquiries about his sister. He started a search for his sister. He saw the Prosecutrix entering the house of the Accused No.2/Respondent No.2. The brother

of the Prosecutrix went to the Police Station and lodged a missing report. On the next day i.e. on 29th March 1987 early in the morning the Complainant returned to his house at about 4.30 a.m. when he was informed about the incident. The Complainant conducted search to trace out the Prosecutrix. From P.W.5 Mohan Lavate, the Complainant learnt that the Accused No.1/ Respondent No.1 had taken away Sunanda. Therefore, the Complainant lodged a complaint with Vijapurnaka Police Station on 29th March 1987. Ultimately the Police could trace the Prosecutrix and she was found in the house of one Alka Ahire at Dighi, Pune. The prosecution examined 20 witnesses. The Complainant P.W.1 Khandu, his son P.W.15 Kallappa, and the Prosecutrix Sunanda P.W.16 were examined by the prosecution. Apart from the panch witnesses, the prosecution examined P.W.5 Mohan Lavate in whose tempo Accused No.1 took the Prosecutrix from Solapur upto village Kondi. P.W.6 Chandrakant Shinde is driver of taxi. Accused No.1 took the prosecutrix by the said taxi driven by P.W.6 from Kondi to Pune. The prosecution also examined P.W.11 Laxman Kokani. Accused No.1 initially took the Prosecutrix to the house of said Laxman and stayed one night in his house wherein offence of rape was allegedly committed by him. P.W.11 Laxman took Accused No.1 and Prosecutrix to the house of one Alka Ahire where the Police located the Prosecutrix and

the Accused No.1. The prosecution has also led evidence of P.W.18 an employee of the Sholapur Municipal Corporation to prove the date of birth of the Prosecutrix. P.W.12 Dr.Vaijayanti is the Medical Officer who examined the Prosecutrix. The learned Sessions Judge by the impugned Judgment and Order held that the prosecution has failed to prove the commission of offence of kidnapping and rape. The learned Sessions Judge held that the Prosecutrix voluntarily accompanied the Accused No.1 to Pune. The learned Sessions Judge also held that the prosecution has failed to prove that the Accused No.1 had sexual intercourse with the Prosecutrix.

4. Shri Mhaispurkar, learned A.P.P. submitted that there was ample evidence on record to establish that on the date of the incident the age of Sunanda was only 14 years. He submitted that there was no reason to disregard the evidence of Sunanda. He submitted that her evidence inspires confidence and conviction could have been based on her sole testimony. He submitted that there is enough evidence on record which gives necessary assurance to the testimony of Sunanda. He submitted that the certificate issued by the Headmaster of the School in which Sunanda was taking education discloses that her date of birth is 9th April 1973. He

invited our attention to the deposition of various witnesses. He stated that the evidence of the prosecutrix Sunanda that the Respondent No.1 had intercourse with her without her consent will have to be accepted. He submitted that the entire approach of the learned Sessions Judge was erroneous considering the nature of offence committed by the Respondent.

5. Shri Mane, the learned Counsel appearing for the Respondents submitted that a clear finding on the basis of the evidence on record has been recorded by the learned Sessions Judge that the prosecution has failed to prove that there was sexual intercourse. He pointed out relevant portion of the examination-in-chief and cross-examination of the prosecutrix and contended that the prosecutrix and the Respondent No.1 had long standing relationship. He submitted that the evidence of the prosecutrix shows that she voluntarily accompanied the Respondent No.1. He submitted that the material omissions in the evidence of the prosecutrix have been brought on record. He submitted that the evidence of the prosecutrix is not at all trustworthy and therefore, it cannot form the basis of the conviction. He submitted that the case of the prosecution is not supported by medical evidence and therefore, assurance cannot be drawn from the evidence

on record to the evidence of the prosecutrix. He submitted that no interference was called for in the appeal against acquittal.

6. For considering the rival submissions, it will be necessary to refer to the evidence on record. P.W.1 Khandu Govind Kamble is the complainant and father of the prosecutrix. He has deposed that Sunanda is his fourth daughter and her age at the relevant time was 14 years and at that time she was taking education in Mahatma Phule Vidyalaya at Solapur. He stated that shortly after mid-night of 27th March 1987 i.e. in the early hours on 28th March 1987 he left his house for reporting to duty. He came back to his house in the morning at 4.30 a.m. on 29th March 1987 when he found that the members of the family were awake and were in disturbed condition. He learnt from the members of the family that Sunanda had left the house at about 7.00 a.m. on 28th March 1987. She returned to the house in the recess of the school at about 9.00 a.m. Thereafter she went back to the school and never returned to the house. He stated that his son Kallappa lodged a missing report with Vijapur Naka Police Station. He stated that on 29th March 1987 he conducted search and made enquiries. At about 5 or 5.15 p.m. one Shri Lavate, a Tempo Driver, informed him that the Respondent

No.1/Accused No.1 had taken away Sunanda in another Tempo. Therefore, he went to the Police Station and lodged report against the Respondent No.1. In the cross-examination certain suggestions were put to P.W.1 correctness of which was denied by him. One minor omission regarding failure to state his religion in the complaint was brought on record. P.W.2 is a panch witness. He was taken by the Police to the house of the Respondent No.2 and in his presence the Prosecutrix Sunanda pointed out the place where she was hiding in the house. Panchanama of the said place of offence was prepared in his presence. In presence of this witness at the Police Station, P.W.1 produced the birth extract and mark list of the prosecutrix Sunanda. The said documents were attached at the Police Station under a panchanama signed by P.W.2 as a witness and he has proved the said Panchanama in his evidence. He was also called to the Vijapur Naka Police Station on 13th April 1987. At that time one Nagnath Kale produced a register in which he had noted the measurement of the blouse of the prosecutrix Sunanda. The said register was also attached under a panchanama to which P.W.2 is a signatory as a witness. He proved the said panchanama in the evidence. In his cross-examination nothing relevant has been brought on record in favour of the Accused.

7. P.W.3 Narayan is also a panch witness. At the relevant time he was working with one Shivaji Gandmal. The said Shri Shivaji produced the duplicate receipt book Shri Ganesh Saree Centre which was attached by the Police under a panchanama. P.W.3 is one of the panch witnesses who proved the panchanama in evidence. His cross-examination is not material as nothing relevant has been extracted from the said witness. P.W.4 is again a pancha witness to the panchanama under which a receipt book from the shop of one Shri Ganesh Ramchandra Apte was attached. The said receipt book shows that a silver ring was purchased on 26th March 1987. P.W.4 proved the said panchanama in his evidence. Only certain suggestions were given to him in the cross-examination the correctness of which was denied by him.

8. P.W.5 Mohan was working as driver since the year 1987. He was employed by one Shri Sherkhane as a driver of Metador bearing registration No.MXO 5156. He stated that on the date of incident he was observing fast. He stated that the accused No.1 Deepak came to his house on that day when he was about to leave his house for attending to his duty. He stated that the Accused No.1 Deepak made enquiry with him whether his Tempo was

available as he was desirous of visiting Tulzapur along with two or three other persons. P.W.5 told Deepak that his Tempo was available and he will have to pay a sum of Rs.200/- for Tulzapur trip. The accused Deepak agreed to pay the said amount. He then boarded the tempo. As per his direction P.W.5 took him to Utkarsha Nagar wherein house of Accused No.2 Pushpabai is located. At the said place Accused Deepak, Accused No.2 Pushapabai and one boy boarded the Tempo. Deepak asked him to take the Tempo near Bhagatsing Market by Hotgi Road. As per his direction, P.W.5 stopped the Tempo near Bhagatsing Market and the accused and other persons got down by asking him to wait there. After about 10 to 20 minutes both the accused, the boy and one girl came there in a rickshaw and the Accused Deepak and girl boarded the Tempo. Accused No.2 Pushpabai and the boy went away. When P.W.5 came near Pancharapol Square the Accused No.1 told him that he was desirous of going to Pune. Accordingly he took the vehicle to Bale Road and purchased diesel at Bale Petrol Pump. P.W.5 identified the prosecutrix Sunanda in the Court. He stated that on the way to Pune near village Kondi he found the engine of the vehicle getting over heated. He, therefore, stopped the vehicle. He noticed that a taxi which was used for transporting passengers was coming from Solapur to Pune . By giving light signal the Taxi was stopped

by him and he enquired with the Driver whether he was willing to take two passengers while returning to Pune. The driver of the taxi agreed to take both the passengers and stated that per person Rs.50/- will have to be paid. The driver stated that he will come back after leaving the parcels at Solapur. He stated that the Accused Deepak willingly agreed to pay the said amount. Accordingly P.W.5 left the Accused and the prosecutrix Sunanda at Kondi near Siddheshwar Hotel and returned to Solapur. In the cross-examination P.W.5 stated that the girl accompanying the Accused Deepak was well dressed and seen to be happy. He stated that due to the noise created by the engine, he could not hear the conversation between them. He stated that near the petrol pump from where he purchased the diesel there was number of hotels and shops. He admitted that at the petrol pump the accused No.1 Deepak went to the cabin of the petrol pump and paid the price of the diesel. He stated that journey from Sholapur to Pune by road takes about 2 to 2-1/2 hours by car.

9. P.W.6 Chandranat is the person who was allegedly driving the taxi MXQ 5542. He stated that the taxi belongs to his father and the same is driven by his father or he himself. He deposed that after he passed village Kondi one tempo came from the side of Solapur

and gave a light signal. He therefore stopped the taxi. The driver of the Tempo asked him whether he could take two passengers to Pune. He told the driver of the tempo that he will have to first deliver the parcels at Solapur and thereafter he can take the passengers. He informed the driver of the tempo that one and half hour's time will be required for that purpose. He stated that the passengers in the tempo told him that they will take meals at Kondi and will wait for him. He stated that after delivering the parcels at Solapur, he took three passengers and came near the hotel at Kondi. The said two passengers boarded the taxi. The passengers got down at Pool Gate at Pune and they informed him that they were going to Yerawada. he stated that the taxi fare of Rs.100/- was paid by Accused No.1 Deepak. He identified Accused No.1-Deepak and the prosecutrix Sunanda in the Court and stated that they were the passengers. He stated that the boy and the girl were sitting next to him in the taxi. He stated that at village Bhigwan he had stopped for tea where the passengers also got down for taking tea. One omission was brought on record. The omission is regarding the failure to state before the Police that the passengers told P.W.6 that they were going to Yerawada.

10. P.W.7 is one Neeta Narayan Kulkarni. This witness is a sales girl working in the shop of Apte Jewellers at Solapur. She deposed that both the accused came to the shop and demanded a silver ring over which the letter "D" is inscribed. They also demanded silver ear rings. They purchased the articles worth Rs.150/- for which bill was prepared by her and was signed by another sales girl. The bill was prepared in the name of Accused No.1. She proved the duplicate bill which was produced on record. In the cross-examination it was suggested to her that since number of customers are visiting the shop, she was not in a position to identify the accused. However, she denied the correctness of the said suggestion. She admitted that she had not seen the customers prior to the date on which the said articles were purchased.

11. P.W.8 is Keshav Balaram Gaikwad who is a panch witness in whose presence garments on the person of the Accused No.1 Deepak were attached. He identified the articles and also proved the panchanama under which the garments were attached. Nothing material is brought out in his cross-examination. P.W.9 Vasanti Vasantrao Kulkarni is also a panch witness in whose presence clothes on the person of the Prosecutrix were attached. She identified the clothes and she also proved the

panchanama under which the clothes were attached. Her cross-examination is also hardly material.

12. P.W.10 Raiz carries on the business of preparing Mangalsutra in front of the shop of Apte Jewellers. He stated that on 24th March 1987 the Accused approached him and on their request he prepared a Mangalsutra of the description stated by him. He identified the said Mangalsutra which was produced before the Court. He stated that he charged Rs.6/- for the work of preparing the Mangalsutra and the charges were paid by the Accused No.1. In the cross-examination he admitted that he cannot give any reason why he identified the said Mangalsutra. He admitted that he had not stated any reason for identifying the Mangalsutra when his statement was recorded. He admitted that he had not maintained any note about the customers and the transactions.

13. P.W.11 Laxman is the maternal uncle of Accused No.1 Deepak. He stated that on 28th March 1987 at about 9.00 p.m. Accused No.1 Deepak came to his house with a girl by name Sunanda. At that time the Accused No.1 was carrying one air-bag. The Accused No.1 told him that he had come casually to his house. P.W.11 did not believe the same to be correct. However, he could not send

Accused No.1 Deepak back to Solapur as due to month end he was not having spare money for bearing the travelling expenses and therefore, he asked the Accused No.1 to stay in his house till the first day of the next month. He stated that his wife did not approve this. therefore, on the next day, she went to her parent's house. He, therefore, made arrangement for the residence of Deepak and Sunanda at the house of his neighbour one Alka. According to him both of them stayed in the house of one Alka for two days. Thereafter one Constable met him and he took the Constable to the house of Alka, where the Constable took the Accused No.1 and Sunanda in custody. In the cross-examination Laxman admitted that Sunanda told him that she desired to visit Pune for site seeing and therefore, she has asked Deepak to accompany her. The learned Sessions Judge has recorded during the course of cross-examination that P.W.11 Laxman was taking considerable time for answering the question. He has recorded that it appears that the witness was not sure about his answer. During the course of cross-examination the witness was declared as hostile at the instance of the learned Public Prosecutor. In cross-examination by the Public Prosecutor he stated that he did feel that bringing such a girl to his house by his nephew was a serious offence.

14. P.W.12 is Dr.Vaijaynati, the Medical Officer, who examined the prosecutrix Sunanda. In examination-in-chief, she stated that she examined the prosecutrix on 2nd April 1987. There were no marks of violence on her person. She stated that hymen was not present and there was no fresh tear. She stated that two finger PV could be done easily without any difficulty. From the x-ray plates of the prosecutrix she opined that the age of the girl can be between 14 to 16 years. In cross-examination she admitted that from the finding of PV examination it can be said that the girl as accustomed to sexual intercourse. She stated that opinion regarding age is always given keeping in mind the extent of marginal error.

15. P.W.13 Nagnath is an employee of the Solapur Municipal Corporation. He produced the original birth Register for the period from 14th March 1973 to 3rd June 1973. The said register contains an entry at Sr.No.4650 which shows that a female child is born to Parvatibai Kamble and the name of the father is Khandu Govind kamble. In cross-examination he stated that the entry is made on the basis of the form filled up by the informant. P.W.14 Raosaheb is headmaster of Mahatma Phule Vidya Mandir since 1976. He proved the

certificate dated 13th April 1987 issued by him which was issued on the basis of the entries in the General Register of the School. He stated that according to the General Register the date of birth of Sunanda is 9th April 1973. He stated that Sunanda was admitted in his School on 9th December 1981 and she left the School on 13th July 1983. She again took admission in the School on 21st September 1985 for which also a separate entry was made in the register. There is nothing significant in his cross-examination.

16. P.W.15 Kallappa is the brother of the prosecutrix. He has stated that on 28th March 1987 Sunanda left the house at about 7 to 7.30 a.m. and went to School. She came to the house at about 9.00 a.m. for taking tea and went back to the School. Fifteen or twenty minutes thereafter he was proceeding to the house of his another sister Anupama. While returning from the house of Anupama he saw Sunanda near the house of the Accused No.2 Pushpa. He, therefore, made enquiries with Accused No.2 Pushpa. Pushpa informed that Sunanda was not in her house. He saw a Tempo bearing No.MXO 5156 parked by the side of the house Pushpa. He therefore went to the School where he was told that Sunanda was not in the School, After informing his mother he searched for his sister and when his sister could not be located, he

recorded a complaint with the Police. He stated that P.W.5 Lavate informed him on the next day in the evening that Accused No.1 had taken his sister Sunanda to Pune. An omission was brought on record in his cross-examination. The omission is to the effect that he did not state before the Police that Sunanda entered the house of one lady after she saw him. He admitted that at that time he did not make enquiries with the driver of the Tempo.

17. P.W.16 is prosecutrix Sunanda. She has supported the prosecution. She stated that by showing a knife the Accused No.1 took her to the house of the Accused No.2 and she was threatened by Accused No.1 not to raise cries. As per his instructions she remained in the house of the Accused No.2. According to her the Accused No.2 also gave her threat. One Balu a boy who was present in the house of the Accused No.2 also threatened her. She was compelled to board a tempo by Accused No.1 by threatening her by a knife. She also described the circumstances under which the Accused was required to take a taxi for going to Pune. She stated that though rice plate was provided for her by Accused No.1 Deepak she did not eat any food. She stated that she sat on the front seat along with Accused No.1. After reaching Pune they took a autorickshaw and went to the house of

Laxman, the maternal uncle of the Accused No.1. She stated that in one of the two rooms she slept with the Accused No.1 and in the other room which is a kitchen Laxman and his wife slept. She stated that in the night rape was committed by Accused No.1 after giving her threats. On the next day there was a quarrel between Laxman and his wife. Laxman gave her a saree and the Accused No.1 compelled her to wear Mangalsutra and ear rings. She stated that thereafter she was taken to the house of Alka where they had a meal. She stated that she and Alka slept inside the house and the Accused No.1 Deepak slept outside the room. However, on the subsequent two nights she slept with Deepak inside the house and Alka slept outside. She stated that in both the nights the Accused No.1 had forcible sexual intercourse with her.

18. In cross-examnation, the prosecutrix stated that when she was in the house of Alka, she compelled her to wear red coloured saree on Gudipadva day. She stated that Laxman told her that Alka was his wife. In the cross-examination she was shown certain photographs. She admitted that she was appearing in the said photographs. She admitted that she never gave any cries when Accused No.1 threatened her. She stated that she did not make statement before the Police that a chit

having a picture of flower was written by her and the words "S.D." in the chit refer to Sunanda and Deepak. She admitted that she did not mention in her Police statement that Deepak threatened her with a knife and gave a threat to her when she was in the school premises. She denied the suggestion that her age was 20 years.

19. P.W.17 Ashok is also a panch witness to the search conducted by the Police at the house of Laxman, the maternal uncle of Accused No.1 Deepak. From the said place air bag of Accused No.1 Deepak and certain clothes were attached. He is a signatory to the panchanama and he has proved the panchanama in evidence. P.W.18 is Headconstable Yakub who went to the house of Laxman and Laxman took him to the house of Alka where Accused No.1 Deepk and Prosecutrix were staying. He recorded statement of certain witnesses. P.W.19 Appa Madhavrao Patil is the Investigating Officer who deposed about the various statements recorded by him and the steps taken by him in the investigation. Certain portions of the statements of the witnesses recorded by him were proved in his evidence. P.W.20 Srinivas is son of the owner of Ganesh Centre. He was examined to prove the duplicate cash memo of the saree purchased from M/s.Ganesh Saree Centre. However, he could not identify the Accused and

therefore, the witness was declared as hostile.

20. P.W.11 Laxman who is the maternal uncle of the Accused No.1 Deepak has not testified in examination-in-chief that the Accused No.1-Deepak and Prosecutrix slept in a separate room and he and his wife slept in kitchen. The Prosecutrix has however deposed to that effect. The case of the prosecutrix is that on 28th April 2004 she slept with Accused No.1 Deepak in one room and Laxman and his wife slept in kitchen. According to the Prosecutrix Laxman's wife protested. Laxman's wife has not been examined by the prosecution. Moreover if the allegation of the Prosecutrix that in that night Accused No.1 committed offence of rape, the Prosecutrix would have shouted for help or would have atleast protested. The Prosecutrix has stated that on the first day on which she stayed in the house of Alka, Deepak slept outside the house. However, on the subsequent two days Alka slept outside the house and Deepak had forcible intercourse with her. This version is difficult to accept. It is not understood how Alka being a lady will sleep outside the house on two consecutive nights. It appears from her evidence that on number of occasions the Prosecutrix had opportunity to protest. But she has not protested. The driver of the Tempo stated in his evidence that at the petrol pump

the Accused No.1 Deepak got down from the Tempo and paid the diesel charges by visiting the cabin of the petrol pump. After the Accused No.1 and the Prosecutrix left the Tempo, they went to a restaurant in a busy locality where there are number of restaurants and shops. In fact she left the School without any protest with the Accused No.1 Deepak. The Prosecutrix was confronted with certain photographs in which she is seen with the Accused No.1. She admitted the photographs. However, stated that the Photographs have been taken forcibly. She admitted that the Photographs are taken about 3 to 4 months before she was taken to Pune. From the point when the Accused No.1 took the Prosecutrix from the School till the Police Constable arrived at the house of Alka, there are no efforts made by the Prosecutrix to raise any alarm. The Prosecutrix moved along with the Accused No.1 from place to place. In so far as the medical evidence is concerned P.W.12 Dr.Vaijayanti examined the prosecutrix on 2nd April 1987 i.e. after three days from the date of alleged rape. She noted that hymen was not present and there was no fresh tear seen. She admitted that findings of PV examination shows that the Prosecutrix was accustomed to sexual intercourse.

21. It is a very well settled law that conviction under

section 376 of the Code can be based on the sole testimony of the Prosecutrix. Whenever the Court is not fully satisfied with the evidence of the Prosecutrix, it is open for the Court to draw assurance from the evidence of other witnesses. In the present case, such an assurance cannot be drawn from the evidence of the Medical Officer who examined the Prosecutrix. In so far as the evidence of Laxman is concerned, he has not stated that the Accused No.1 Deepak and the Prosecutrix slept together in a room in his house. Alka at whose residence offence is allegedly committed is also not examined. Therefore, there is no material on record from which assurance can be drawn in support of the testimony of the Prosecutrix. Considering the nature of evidence of the Prosecutrix, in the absence of assurance from other witnesses, this is not a case where conviction can be based on her sole testimony. That is the reason why the learned Sessions Judge has come to the conclusion that the offence under section 376 of the Code is not established.

22. So far as the offence of kidnapping is concerned, the learned Sessions Judge has held that the evidence on record indicates that the Prosecutrix left the protection of her parents on her own. The said conclusion drawn by the learned Sessions Judge is based

on evidence on record and after scanning the evidence we are of the view that the conclusion drawn by the learned Sessions Judge is right.

23. There is no merit in the Appeal and the appeal is dismissed.

(Smt.Ranjana Desai, J.)

(Abhay S.Oka, J.)